Filed 5/18/16 P. v. Parker CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DARION SAINTCYER PARKER, Defendant and Appellant.	E063066 (Super.Ct.No. FSB1400755) OPINION

APPEAL from the Superior Court of San Bernardino County. William Jefferson Powell IV, Judge. Affirmed.

Jean Matulis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Kristine A. Gutierrez, Lynne G. McGinnis, and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTON

Defendant Darion Saintcyer Parker is an admitted gang member and felon, prohibited from possessing deadly weapons. During a search of defendant's residence, his probation officer discovered that defendant had a stolen gun hidden in a hallway closet.

A jury convicted defendant of one felony count of possession of a firearm by a felon (Pen. Code, § 29800, subd. (a))[1] and one misdemeanor count of receiving stolen property. (§ 496, subd. (a).) The jury also found true the street gang allegations that count 1 was committed under section 186.22, subdivision (b)(1)(A), and count 2 was committed under section 186.22, subdivision (d). The court found defendant had two prison prior convictions within the meaning of section 667.5, subdivision (b).

The court sentenced defendant to the upper term of three years on count 1, and imposed the aggravated term of four years on the gang enhancement. The court also imposed an additional year for each prison prior, for a total sentence of nine years in state prison.

On appeal, defendant argues the evidence was insufficient to support his convictions. Defendant further claims that his constitutional rights were violated by the

[1] All statutory references are to the Penal Code unless stated otherwise.

admission of statements he made about his gang affiliation during the booking process, as well as admission of the gang expert's testimony.

Respondent agrees that defendant's booking statements should have been excluded but contends any error was harmless beyond a reasonable doubt. As for defendant's other claims, we hold defendant did not object below to the expert's testimony; defendant has failed to demonstrate that the challenged evidence was testimonial in nature; and, finally, substantial evidence supported the verdicts. We affirm the judgment.

II

STATEMENT OF FACTS

A. The Gun and Stolen Property Offenses

In June 2013, Christopher Lee Marinzack reported to the police that an MP2022 .40-caliber Smith and Wesson gun, worth about $600 or $700, was stolen from his house.

On August 30, 2013, defendant informed his probation officer that he would be living with Timmarie Tyson, and their children, at 9635 Emerald Court in Fontana. The terms and conditions of defendant's probation included prohibitions that he not possess weapons or have any association with gangs.

On February 6, 2014, sheriff's deputies served a search warrant on Tyson, who was at home with defendant and their children, including a sick infant needing medical attention. With permission from the officers, defendant left the residence to follow the ambulance transporting the baby to the hospital. During a search, defendant's probation

officer found the stolen firearm with a loaded magazine in a hallway cabinet. In the living room, officers also found a cell phone with gang-related photographs of defendant.

B. Gang Evidence

A gang expert testified that a gang card, or field interview card, is a law enforcement record kept for criminal investigations. A gang card dated November 2009 identified defendant as being a "self-admitted," "inactive" member of two cliques of the Rollin' 60's street gang. Defendant admitted he had been "jumped in" to the gang at age 14. His gang moniker then was "Ton Boy."

Two inmate classification forms, dated November 2013 and July 2014, identified defendant as having admitted being a member of the Rollin' 60's Crips, although he claimed to be inactive but not a dropout. Dropping out of a gang is not the same as being inactive. Being a "dropout" can jeopardize an inmate's safety but being inactive can mean that the person is not actively participating in crimes while still in good standing. Another gang moniker used by defendant, with the same initials as "Ton Boy," was "Tuna Brain."

Deputy Emanuel Popa, a gang investigator, is familiar with the Rollin' 60's gang based on contact with other gang experts, review of gang cards and reports, and contact with various members of the gang. The Rollin' 60's gang is named after 60th Street in Los Angeles which "rolled" through the entire neighborhood. Due to a gang injunction in Los Angeles, the gangs were pushed into other counties, including San Bernardino. The group started in the late 1970's as a faction of the Crip gang called the Westside

Crips. The Rollin' 60's has over 1,200 members. They use a variety of identifying symbols including the letter "S"; the letters "RSC"; "R 60s"; "NHC" for Neighborhood Crips; "RR" for "Rollin' Rich," one of the gang's cliques; and the Seattle Mariners' sports logo. The Rollin' Rich clique derived its name from the money they obtained from bank robberies. The gang members also use hand signs for "N" (neighborhood) and "C" (Crip) and identify themselves with the color blue.

The primary criminal activities of the Rollin' 60's gang include murder, assault with deadly weapons, vandalism, drug trafficking, robberies, burglaries, and weapons violations. A Rollin' 60's member named Dillon Ball was convicted for the offense of being a felon in possession of a handgun in October 2013. Another gang member, Joseph Cray, was convicted of the same charge for an offense committed in May 2013. Defendant himself was convicted of a burglary committed in June 2012, along with fellow gang member, Michael Nelson, and of possession of marijuana for sale in November 2009.

Popa reviewed gang cards and classification records pertaining to defendant which documented him as a Rollin' 60's member. The gang cards were from 2007 to 2010. The inmate classification records were from 2006 to 2014. Defendant was not a dropout who had ever been debriefed by law enforcement. Defendant had multiple gang tattoos. Cell phone photographs found during the search showed defendant wearing gang colors and making gang signs. In a photograph of defendant with his infant son, the baby wore a hat with the same initials, "TB," as defendant's moniker.

In Popa's opinion, defendant is an active member of the Rollin' 60's gang. Defendant's possession of a stolen firearm benefitted the gang because stolen firearms are often used in gang crimes and shootings. Possessing a stolen gun would enhance a member's status within the gang.

C. Defense Evidence

Johnny Loza is a gang intervention prevention mediator, who has worked for numerous law enforcement agencies and foundations. Loza is a former gang member, who was able to leave a gang without either being jumped out or formally debriefed. Because of ongoing problems with gang members, Loza has carried a gun or knife for protection. Loza disagreed that the possession of a stolen firearm necessarily means the person is acting for the benefit of a gang.

Tyson testified that, on February 6, 2014, defendant was not living with her. They were not married until August 2014. She claimed the gun did not belong to her or defendant.

III

JAIL CLASSIFICATION EVIDENCE

The parties agree that, based on *People v. Elizalde* (2015) 61 Cal.4th 523, it violated *Miranda v. Arizona* (1966) 384 U.S. 436 to admit booking statements defendant made about his gang affiliation during jail classification interviews. However, defendant argues the error was prejudicial and respondent argues the error was harmless beyond a reasonable doubt.

During classification interviews, defendant admitted twice that he was a gang member, first in November 2013, then again in July 2014. Deputy Popa, the gang expert, testified that he relied partly on the admissions contained in these forms to conclude that defendant was an active member of the gang. Popa also relied on the gang interview cards dated from 2007 to 2010, as well as other information about defendant and his affiliation with the Rollin' 60's gang.

In *Elizalde*, the California Supreme Court held that classification interviews which take place when a defendant is booked into jail constitute custodial interrogation for purposes of Miranda. (*People v. Elizalde*, *supra*, 61 Cal.4th at pp. 527, 530-533.) The court found that questions about gang affiliation do not fall within the "narrow exception . . . for basic identifying biographical data necessary for booking or pretrial purposes" (*id*. at p. 538); and are not part of the "public safety exception" to *Miranda*'s requirements. (*Id*. at pp. 540-541.) Thus, while booking officers can "ask arrestees questions about gang affiliation during the booking process" for security processes, unless such questions are preceded by *Miranda* warnings, which the defendant waives, a defendant's answers are inadmissible during the prosecution's case-in-chief. (*Id*. at p. 541.) The *Elizalde* court, however, found the error was harmless beyond a reasonable doubt under the standard for constitutional error set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (*Elizalde*, at p. 542.)

In *Elizade*, three witnesses testified they knew the defendant was in a gang and he was seen making hand signs and wearing gang colors. An expert also testified to the

defendant's gang membership. (*People v. Elizalde, supra,* 61 Cal.4th at p. 542.) Similarly here, other evidence serves to establish defendant's membership in the Rollin' 60's gang. When defendant was booked into jail, he had gang tattoos on each arm. Such evidence does not involve making a statement and therefore does not implicate *Miranda*. (*Pennsylvania v. Muniz* (1990) 496 U.S. 582, 589.) The two booking officers could also testify that, if defendant was a "dropout"—and not an inactive member—he would have been debriefed and housed in protective custody—neither of which occurred.

Deputy Popa testified the jail classification cards were only one of several factors he relied upon in forming his expert opinion about defendant's gang membership. The gang expert also relied on the gang cards, which were prepared when defendant, in the company of two other gang members, admitted he was a member of the Rollin' 60's gang and two of its cliques, Front Hood and Rollin' Rich, and that he used the moniker "Ton Boy." Popa photographed seven gang-related tattoos on defendant's body, which were introduced into evidence. Furthermore, the photographs on the recovered cell phone showed defendant wearing gang clothing and making gang hand signs, while another showed defendant's infant son wearing gang attire. Gang writing, scribbled on business mail, was also found during the search of defendant's residence. Accordingly, the error in admitting defendant's admissions during the classification interviews as part of the basis for the expert's opinion was harmless beyond a reasonable doubt. (*People v. Elizalde, supra,* 61 Cal.4th at p. 542; *People v. Leon* (2016) 243 Cal.App.4th 1003, 1020-1022.)

IV

SUBSTANTIAL EVIDENCE

The same standards of review apply to a claim of insufficient evidence for either a conviction or a gang enhancement. (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.) On appeal, the reviewing court reviews the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Story* (2009) 45 Cal.4th 1282, 1296.)

The same standard of review applies when the prosecution relies mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) The trier of fact is free to disbelieve testimony and to infer that the truth is otherwise when circumstantial evidence of the defendant's actions supports such an inference. (*People v. Beeman* (1984) 35 Cal.3d 547, 558-559; *People v. Thornton* (1974) 11 Cal.3d 738, 754, overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 685.) The testimony of a single witness can be sufficient evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

A. Possession of a Stolen Firearm

The jury found defendant guilty of one count of possession of a firearm and one count of possession of stolen property. Section 29800, subdivision (a)(1), prohibits a person who has been convicted of a felony from owning, purchasing, receiving, or having

under his possession or control, any firearm. Section 496, subdivision (a), prohibits any person from knowingly buying, receiving, selling, or withholding any stolen property from its owner.

Possession may be physical or constructive, and more than one person may possess the same contraband if the defendant's right to exercise dominion and control over the place where the contraband was located is shared with another. (*People v. Valerio* (1970) 13 Cal.App.3d 912, 921; *People v. Montero* (2007) 155 Cal.App.4th 1170, 1175-1176.) In *People v. Williams* (2009) 170 Cal.App.4th 587 [Fourth Dist., Div. Two], during a residential search, the officers found guns, ammunition, drugs and paraphernalia, and mail addressed to the defendant, as well as clothing in defendant's size and displaying defendant's moniker. The officers arrested all seven men in the residence, including the defendant, who was convicted of various charges relating to possession of drugs, a revolver, and ammunition. (*Id.* at pp. 596-597.)

On appeal, the defendant claimed that the evidence was insufficient to support his conviction on any of the possession offenses because the house did not belong to him, and the other men had access to the contraband. (*People v. Williams*, *supra*, 170 Cal.App.4th at p. 624.) Rejecting the argument, this court observed, "defendant asks this court to reweigh the evidence and view it in the light most favorable to the defense, contrary to the governing standard of review." (*Id.* at p. 625.) The court held that the jury's verdict was supported by several facts: defendant told officers the house was his; he was working on his computer when they arrived; the gun was near the computer; a bag

near the ammunition resembled one belonging to the defendant; there was mail and identification in the defendant's name sent to that address; clothing in his size was in the bedroom; the gang expert testified that defendant led his gang's drug trade; and the sales of narcotics was one of the gang's primary activities. (*Id.* at p. 624.)

In this case, defendant claims he did not possess the firearm found at the house at 9635 Emerald Court. Defendant argues he did not live at the Emerald Court house although other people did but no one saw him with the gun and the prosecution did not prove he used the gun. In contrast, substantial evidence supported defendant's conviction. In August 2013, defendant told his probation officer he had moved to 9635 Emerald Court in Fontana with Tyson and their two children. A deputy had observed defendant entering the Emerald Court house in November 2013. One of the terms of probation required defendant to give notice if he moved. Defendant gave the same Emerald Court address when he was booked into the Central Detention Center on November 13, 2013, and when he was booked into the West Valley Detention Center on July 12, 2014. At the time of the search, the only people present at the Emerald Court house were defendant, Tyson, and two small children. The gun in a hallway closet of the Emerald Court house was unsecured, leading to a reasonable inference defendant had seen it and knew that it was there. After defendant went to the hospital, he did not return to the Emerald Court house or respond to the officers' efforts to contact him, indicating a consciousness of guilt. (See *People v. Cowger* (1988) 202 Cal.App.3d 1066, 1073.) In addition, the gang expert testified that the primary activities of defendant's gang included

weapons violations. Accordingly, the evidence was more than sufficient to sustain the two convictions for possession of a stolen weapon.

B. Gang Allegations

As to both counts, the jury also found the gang allegations true. The prosecution must prove two prongs of the gang enhancement of section 186.22, subdivision (b)(l): (1) the crime was committed for the benefit of, at the direction of, or in association with any criminal street gang; and (2) the crime was committed with the specific intent to promote, further, or assist in any criminal conduct by gang members. (§ 186.22, subds. (b) & (e); *People v. Albillar* (2010) 51 Cal.4th 47, 59-60; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.)

Gang evidence, including expert testimony, is relevant and admissible to prove the elements of the gang enhancements. (*People v. Williams*, *supra*, 170 Cal.App.4th at p. 609; *People v. Vang* (2011) 52 Cal.4th 1038, 1044; *People v. Gardeley* (1996) 14 Cal.4th 605, 617-618.) The trier of fact may rely upon expert testimony about gang culture and habits to reach a finding on a gang allegation. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930; see *Vang,* at p. 1048.)

Deputy Popa testified that he had eight hours of instruction in the sheriff's academy regarding criminal street gangs, followed by a two-week course regarding gangs. As a patrol deputy, he attended advanced gang awareness courses. His total training hours exceeded 100. He has daily contact with gang members, and participates in gang sweeps, and has written and assisted search warrants on gang members. He has

testified as a gang expert six times and has worked on over 30 cases involving gangs. He was familiar with the Rollin' 60's gang. Deputy Popa gave his expert opinion that possession of a stolen firearm would benefit the gang because gangs use stolen guns to steal property during robberies and burglaries. Possession of stolen or prohibited guns demonstrates that the gang member is willing to violate the law and enhances the person's gang status and the gang's status in the community.

The prosecutor asked Popa the following hypothetical question: "If a man who is prohibited from possessing a firearm with multiple tattoos related to his gang on his body and prior admissions to being an active member of his gang and prior gang cards and inmate classification sheets related to his gang documenting him to his gang has a stolen firearm in a home where he has claimed to live and where his kids live, would you have an opinion about whether or not that man would be possessing that stolen firearm with the specific intent to promote, further or assist in any criminal conduct by gang members?" Deputy Popa gave his opinion that the man possessed the firearm for the benefit of the gang because the man could either use the gun himself or offer it to the gang to use. Accordingly, there was sufficient evidence for a jury to conclude that defendant possessed the stolen gun for the benefit of the Rollin' 60's gang with the specific intent to promote, further, or assist in criminal conduct by gang members.

We reject defendant's related argument that Popa's testimony constituted improper opinion evidence on defendant' guilt, specifically the prosecutor's question about whether, in Popa's opinion, defendant's possession of a gun on February 6, 2014,

benefitted the Rollin' 60's criminal street gang. Defendant failed to object to the testimony in the court below and has therefore forfeited this issue. (Evid. Code, § 353, subd. (a).)

Defendant also argues that the gang cards Deputy Popa relied upon to form his opinions violated defendant's Sixth Amendment right to confront and cross-examine witnesses. Because this claim is raised for the first time on appeal, it is forfeited. (See *People v. Redd* (2010) 48 Cal.4th 691, 730 [defendant forfeited Confrontation Clause claim by failing to raise it at trial]; accord, *People v. Tafoya* (2007) 42 Cal.4th 147, 166; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1028, fn. 19.) Furthermore, the gang cards are not testimonial because they were not accusatory against defendant. (See *People v. Hill* (2011) 191 Cal.App.4th 1104, 1136.)

Notwithstanding these forfeitures, an expert may give an opinion if it is "'[r]elated to a subject . . . sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300; see Evid. Code, § 801, subd. (a); *People v. Gardeley*, *supra*, 14 Cal.4th at p. 617.) The decision whether to admit expert opinion is within the trial court's sound discretion. (*People v. Prince* (2007) 40 Cal.4th 1179, 1222.) Such evidence is admissible even though it encompasses the ultimate issue in the case. (Evid. Code, § 805; *People v. Wilson* (1944) 25 Cal.2d 341, 349; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371; *People v. Lindberg* (2008) 45 Cal.4th 1, 49.)

In *People v. Valdez* (1997) 58 Cal.App.4th 494, a gang expert testified that in his opinion, the defendant committed the crimes for the benefit of, at the direction of, and in association with, a criminal street gang. He based his opinion on extensive gang-related material, statements, text, messages sent by the defendant, and the facts of the crime. (*Id.* at p. 504.) The Court of Appeal found that "[s]uch an opinion was not tantamount to an opinion of guilt or, in this case, that the enhancement allegation was true, for there were other elements to the allegation that had to be proved." (*Id*. at p. 509.) Here, Popa never gave an opinion about defendant's guilt or innocence. Instead, he stated the crimes were committed for the benefit of the gang. The jury still had to decide whether the enhancement allegations were true. (CALCRlM Nos. 200, 226, and 332.)

Defendant claims that, under *People v. Vang*, *supra*, 52 Cal.4th 1038, the prosecution is limited to asking the expert to assume hypothetical facts in reaching an opinion about whether a crime benefitted a gang but cannot question the expert using evidence presented in the defendant's specific case. In *Vang*, the prosecutor asked the expert a hypothetical question which was identical to the evidence presented at trial: "'Based on the facts of that hypothetical, do you have an opinion as to whether this particular crime was committed for the benefit of and [in] association with or at the direction of the Tiny Oriental Crips street gang?'" The expert responded in the affirmative, gave his opinion, and explained the basis for that opinion. (*Id.* at p. 1043.) Presented with additional facts based on the evidence, the expert also called the attack "gang motivated." (*Ibid.*) The defendant claimed that the hypothetical was objectionable

because it closely tracked the facts of the case and was a "thinly-disguised" attempt to obtain an opinion on guilt or innocence. (*Id.* at p. 1044.) The California Supreme Court rejected the claim, court explaining that a hypothetical not based on the evidence would be improper, because such a question is "irrelevant and of no help to the jury." (*Id*. at p. 1046.) "The questions were directed to helping the jury determine whether *these* defendants, not someone else, committed a crime for a gang purpose. Disguising this fact would only have confused the jury." (*Ibid.*)

Here, the prosecutor's inquiry was a hypothetical question based on the trial evidence. To the extent the jury concluded there were misstatements or omissions in the prosecutor's factual summary, jurors were free to reject Popa's opinion or to give it little weight. The defense had the ability to challenge the opinion based on alternate scenarios. CALCRIM No. 332 instructed jurors to decide whether any information relied upon by the expert was "true and accurate," and told them that if an assumed fact in a hypothetical question was untrue, jurors should consider the effect of the expert's reliance on that fact in forming his opinion. Had defendant objected to the form of the question, the prosecutor could have reframed it. Therefore, it is not reasonably probable defendant would have received a more favorable verdict absent the alleged error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

V

INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant finally contends that, to the extent his specific claims concerning the testimony of Detective Popa are deemed forfeited, trial counsel was ineffective for failing to preserve them. As discussed above, we have concluded that defendant forfeited his claims, first raised on appeal, that Deputy Popa's testimony invaded the province of the jury or violated defendant's Sixth Amendment right of confrontation. Notwithstanding defendant's forfeiture of these claims, defendant has not shown the prejudice necessary to establish ineffective assistance of counsel.

When a criminal defendant complains that trial counsel was ineffective, the defendant must first show the legal representation fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 688; see *People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) Defendant must prove "gross incompetence" (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 382) or errors so serious that counsel was not functioning as constitutionally-guaranteed representation. (*Harrington v. Richter* (2011) 562 U.S. 86, 104.) Reviewing courts generally defer to tactical decisions made by trial counsel, which will not ordinarily be second-guessed. (*Strickland*, at pp. 689-691.) It is presumed that counsel exercised reasonable professional judgment. (*People v. Holt* (1997) 15 Cal.4th 619, 703.)

To establish ineffective assistance of counsel, the defendant must also demonstrate prejudice—whether it is reasonably probable that a result more favorable to the defendant

would have occurred absent the challenged act or omission. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694; *People v. Williams* (1988) 44 Cal.3d 883, 937; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218; *People v. Fosselman* (1983) 33 Cal.3d 572, 584.) The defendant must show that counsel's incompetence resulted in a fundamentally unfair proceeding or an unreliable verdict. (*Harrington v. Richter*, *supra*, 562 U.S. at p. 104; *In re Hardy* (2007) 41 Cal.4th 977, 1019.) The defendant must prove prejudice as a "'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel. [Citation.]" (*Williams*, at p. 937.) Without a showing of prejudice, a reviewing court may reject the claim of ineffective assistance of counsel without determining whether counsel's performance was deficient. (*Strickland*, at p. 697; *In re Scott* (2003) 29 Cal.4th 783, 830.)

Here defendant did not show prejudice because other substantial evidence supported the gang enhancement for defendant's convictions and any motion to exclude Deputy Popa's testimony, except for the booking evidence, would have been futile. First, as already discussed, substantial evidence supported defendant's two convictions for possession of a stolen gun in the closet of the Emerald Court house where he was living with his family. The gang enhancements were also supported by substantial evidence, including defendant's multiple tattoos; his status as an inactive member, and not a dropout; and the gang-related cell phone photographs of defendant and his son.

Additionally, the expert testimony—excluding the booking information—confirmed defendant's gang status. As we have already explained above, Deputy Popa's

response to a hypothetical question based on the facts of this case did not improperly invade the province of the jury. Furthermore, his expert testimony based on the gang cards did not relate testimonial hearsay in violation of defendant's Sixth Amendment right of confrontation. The failure to object to evidence will seldom establish incompetence. (*People v. Freeman* (1994) 8 Cal.4th 450, 490-491.) Because any objection to Deputy Popa's testimony would have been futile, it was not ineffective assistance of counsel not to object to Deputy Popa's testimony in the trial court: "Counsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile." (See *People v. Price* (1991) 1 Cal.4th 324, 387.)

In summary, the gang evidence in this case—except for the booking information—was properly admitted and relied upon by the gang expert. There were no grounds to object to the gang expert's testimony and no prejudice in admitting his opinions and the information upon which he relied. There can be no prejudice or deficient performance under these circumstances. Defendant's claim of ineffective assistance of counsel fails.

VI

DISPOSITION

The single harmless error in this case did not constitute cumulative error.

(*People v. Whalen* (2013) 56 Cal.4th 1, 92; *People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Jasso* (2012) 211 Cal.App.4th 1354, 1378.)

We affirm the judgment in full.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.